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CONSTITUTIONAL LAW

ASSOCIATED GENERAL CONTRACTORS v. CITY AND COUNTY OF SAN FRANCISCO: AN INSURMOUNTABLE HURDLE FOR AFFIRMATIVE ACTION

I. INTRODUCTION

In *Associated General Contractors v. City of San Francisco*,¹ the Ninth Circuit held that a San Francisco ordinance² giving preference to minorities³ bidding on city contracts of \$50,000 or less violated the Equal Protection Clause of the Constitution.⁴

II. FACTS

In response to allegations of discrimination in the awarding of San Francisco ("city") municipal contracts, the Board of Supervisors, in 1982, commissioned a study by the Human Rights Commission.⁵ The Commission reported finding specific claims

1. 813 F.2d 922 (9th Cir. 1987) (per Kozinski, J.; the other panel members were Hug, J., and Beezer, J., concurring.)

2. SAN FRANCISCO, CA., ADMINISTRATIVE CODE ch. 12D (1984).

3. *Id.* at §§ 12D.8(B)(2), 12D.8(B)(3), 12D.9(B)(1), 12D.3. Preferences were also provided for women-owned-businesses, and locally-owned-businesses. *Associated Gen. Contractors*, 813 F.2d at 939, 942.

4. *Associated Gen. Contractors*, 813 F.2d at 944, discussing the U.S. CONST. amend. XIV, § 2.

5. San Francisco Human Rights Commission, Investigation Into Minority and Women Business Participation in City Contracting, October 1983, reprinted in 2 San Francisco Human Rights Commission, Summary Report (abr. ed. 1983) [hereinafter *HRC Report*]. The report states: "While some public testimony included allegations of overt discrimination in the award of contracts, the majority of witnesses testified to allegations of planned or benign exclusion from the notice and award process by virtually all City departments." *Id.* at vi.

of discriminatory activities conducted by the city.⁶ Included in these allegation were statements by minority firms⁷ and individuals working for the city.⁸ Statistical data was also presented that showed an imbalance in the number of city contract dollars awarded to minority firms and the number of minority firms in the city.⁹

Based on its findings, the Board of Supervisors passed City Ordinance 12D.¹⁰ To further the attempt to aid minorities, the ordinance required the following: 1) each city department would set aside ten percent of its purchasing dollars for minority-owned business (MBEs);¹¹ 2) MBEs would get a five percent bidding preference for those contracts put out to bid;¹² 3) each city department would establish a yearly goal for the percentage of contracting dollars to go to MBEs;¹³ and 4) as an overall goal, thirty percent of the city's contracting dollars should go to MBEs.¹⁴

The ordinance was challenged in the district court by Associated General Contractors (AGC)¹⁵ which sought injunctive and declaratory relief¹⁶ to invalidate the ordinance on the grounds that its provisions violated the San Francisco Charter,¹⁷ three separate federal civil rights statutes,¹⁸ and the Equal Protection

6. *Id.* at 18-23.

7. *Id.*

8. *Id.*

9. *Id.* at 27-31.

10. *Associated Gen. Contractors*, 813 F.2d at 931.

11. SAN FRANCISCO, CA., ADMIN. CODE ch.12D § .8(b)2 (1984).

12. *Id.* at § .8(b)(3).

13. *Id.* at § .9(b)(1).

14. *Id.* at § .3.

15. Associated General Contractors of America is a Trade Association that was founded in 1918, has 108 local groups and consists of general contractors engaged in construction. 1 *Encyclopedia of Associations*, 105 (22 ed. 1988).

16. *Associated General Contractors v. City and County of San Francisco*, 619 F. Supp. 334 (N.D. Cal. 1985).

17. SAN FRANCISCO, CAL. CHARTER § 7.200 (1986) provides that contracts will be awarded to the lowest reliable and responsible bidder.

18. AGC claimed violations of the following:

(1) 42 U.S.C. § 1981 (1964) which provides that:

All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens,

Clause of the Fourteenth Amendment.¹⁹

The city filed a motion for summary judgment.²⁰ Finding no genuine dispute over a material issue of fact, the district court granted the city's motion for summary judgment.²¹ The district court's ruling also found that the city's affirmative action ordinance was constitutional.²² The district court ruling included an extensive finding of facts.²³ In response to the challenge made by the construction industry, the district court had specific evidence that demonstrated an imbalance between the number of minority contracts awarded and the number of minority firms in the city.²⁴ The district court decision was appealed to the Ninth Circuit Court of Appeals which found the program unconstitutional.²⁵

III. BACKGROUND

As a tool to remedy racial discrimination, government entities have adopted affirmative action programs.²⁶ Often these pro-

and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(2) 42 U.S.C. § 1983 (1964) which states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the other party injured in an action at law, suit in equity, or other proper proceeding for redress.

(3) 42 U.S.C. § 2000d (1964) which states:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

19. U.S. Const. amend. XIV, § 1.

20. *Associated Gen. Contractors v. City of San Francisco*, 619 F. Supp. 334, 336 (N.D. Cal. 1985).

21. *Id.* at 335.

22. *Id.*

23. *Associated Gen. Contractor*, 619 F. Supp. 334.

24. *Id.* at 5-10.

25. *Associated Gen. Contractors*, 813 F.2d at 944.

26. See *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985) (The court ordered desegregation of Alabama's state trooper force); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir. 1974) (The court ordered desegregation of the Mississippi Highway Patrol); *Local 93 Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct 3063 (1986) (The Court supported

grams have provided for preferential treatment based on race.²⁷ Individuals not eligible for preferential treatment have challenged these programs because they are based on racial distinctions prohibited by the Fourteenth Amendment.²⁸ As a result, programs designed to remedy discrimination are themselves challenged as being discriminatory.²⁹

This portion of the article will focus on four areas: A. Development of the test for reviewing affirmative action, B. The struggle of affirmative action, C. The position of the current Court, and D. The views of other circuits.

A. DEVELOPMENT OF THE TEST FOR REVIEWING AFFIRMATIVE ACTION.

The United States Supreme Court first spoke of a stringent review of actions aimed at "discrete and insular minorities"³⁰ in *United States v. Carolene Products*.³¹ Such actions will not be approved unless they serve a "compelling interest"³² and the means chosen are "narrowly tailored" to achieve that purpose.³³ This level of review has been classified as strict and very few legislative acts survive a strict analysis.³⁴ It has been described as "strict in theory and fatal in fact."³⁵

Classifications that do not affect minority groups or fundamental rights are subjected to a rational basis scrutiny.³⁶ Here the justification for the legislative act can be any reasonable

efforts to redress discrimination by the city fire department in promotion of minority firefighters).

27. See, e.g., *Paradise*, 767 F.2d at 1522, where one minority trooper was ordered promoted with each nonminority.

28. U.S. CONST. amend. XIV, extended to every person in *Shelly v. Kramer*, 334 U.S. 1, 22 (1948).

29. See *supra* note 26 and accompanying text for cases where nonminorities challenged programs for being discriminatory.

30. *United States v. Carolene Prod.*, 304 U.S. 144, 152 n.4 (1938).

31. *Id.*

32. *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980).

33. *Id.*

34. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 1000 (1978) [hereinafter L. Tribe].

35. See Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

36. See generally L. TRIBE, *supra* note 34 at 994.

means for implementing the goal of the act.³⁷ It is rare that under such a test an act would be deemed unconstitutional.³⁸

Occupying the middle ground, is the intermediate level of scrutiny which has been most often applied to distinctions based on gender.³⁹ The classification must be based on an "important governmental interest"⁴⁰ and be "substantially related" to that goal.⁴¹

Affirmative action plans are generally designed to correct the effects of discrimination against "insular minorities."⁴² During the era of school desegregation, the Court determined that the need to integrate the nation's public schools was a compelling governmental interest.⁴³ Programs that took a child's race into consideration were viewed as a permissible use of a racial classification.⁴⁴ The goal of school desegregation outweighed the objections of nonminority students that their Fourteenth Amendment rights had been violated.⁴⁵ The use of race was justified since the government was attempting to remedy the effects of past discrimination.⁴⁶ Therefore, affirmative action programs whose goals are to remedy past discrimination are capable of passing the Court's strict scrutiny test.⁴⁷

One of the critical elements in justifying a race-conscious program is whether there has been racial discrimination.⁴⁸ In the school desegregation cases, the Court first determined that there

37. *Id.* at 996.

38. See generally J. NOWAK, R. ROTUNDA, J. YOUNG, *CONSTITUTIONAL LAW* 530, (3d ed. 1986). [hereinafter J. NOWAK].

39. See generally L. TRIBE, *supra* note 34 at 1060-77.

40. See generally J. NOWAK, *supra* note 38 at 531-33.

41. *Craig v. Boren*, 429 U.S. 190, 197 (1976). The Court applied intermediate scrutiny to classifications based on gender.

42. *United States v. Carolene Prod.*, 304 U.S. 144, 152 n.4 (1938).

43. *Brown v. Board of Educ.*, (Brown I) 347 U.S. 483, 495 (1954). The U.S. Supreme Court ruled that the Fourteenth Amendment prohibits separation of students because of their race. *Id.*

44. See, e.g., *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971). A North Carolina anti-busing law was held invalid as preventing implementation of desegregation plans. *Id.*

45. *Id.*

46. *Id.*

47. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

48. *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971).

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was illegal discrimination.⁴⁹ This provided the compelling interest to survive strict scrutiny analysis.⁵⁰ Later, voluntary programs to remedy discrimination were implemented by different governmental entities.⁵¹ These programs were voluntary in that no court order created the program and there was no judicial finding of past discrimination.⁵² When a nonminority challenged the program, the court was placed in the position of determining if there was a compelling need to implement the program.⁵³

B. THE STRUGGLE OF AFFIRMATIVE ACTION.

In *University of California Regents v. Bakke*,⁵⁴ the Supreme Court ruled that a race-conscious program implemented by the Medical School at Davis, to increase the number of minority medical students, was unconstitutional.⁵⁵

The medical school had created a dual admission program.⁵⁶ Nonminority applicants were summarily rejected if they had a grade point average of below 2.5. Minority applicants were not rejected if their average fell below 2.5 and were reviewed by a separate committee.⁵⁷ Included in the Davis plan was the reservation of sixteen seats in the first year class exclusively for minority candidates.⁵⁸ The effect was that nonminorities could apply for only eighty-four of the one hundred seats in the first year class while minorities could apply for all one hundred.⁵⁹

49. *Id.*

50. *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980).

51. *See Defunis v. Odegard*, 416 U.S. 312 (1974). The *Defunis* case was one of the first voluntary affirmative action programs reviewed by the United States Supreme Court.

52. *See, e.g., University of Cal. Regents v. Bakke*, 438 U.S. 265, 273-74 (1978) (Faculty of the school instituted, on its own initiative, a dual admissions program).

53. *Id.* at 302. Justice Powell held, in *Bakke*, that any program employing race must demonstrate that the classification is necessary to promote a compelling state interest. *Id.*

54. 438 U.S. 265 (1978).

55. *Id.* at 308-09.

56. *Id.* at 273-74. For a discussion of preferential admissions programs, *see generally*, O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L. REV. 699 (1971).

57. *Bakke*, 438 U.S. at 273-74.

58. *Id.* at 289.

59. *Id.*

The *Bakke* Court did not produce a majority opinion.⁶⁰ Only Justice Powell rejected the plan on Equal Protection grounds.⁶¹ Since a classification had been made on race, Justice Powell applied strict scrutiny to the purpose of the program and the means employed to reach that goal.⁶² His analysis rejected the notion that a lower level of scrutiny should have been applied since the program discriminated against whites, a class which traditionally had not been subjected to discrimination.⁶³

Though Justice Powell believed that eliminating discrimination was a compelling governmental interest, he explained that a finding of past discrimination must be made by a competent governmental entity.⁶⁴ The faculty of the medical school was not viewed as a governmental body competent to make a determination of past discrimination.⁶⁵

The program also failed Justice Powell's review because the means used to promote minority participation had too severe an impact on nonminorities.⁶⁶ He pointed out that race can be used in a "neutral" way that falls short of barring participation of nonminority applicants.⁶⁷

Justices Brennan, Marshall, and Blackmun wrote a separate opinion.⁶⁸ In their view, *University of California Regents v. Bakke*,⁶⁹ was an affirmation of the government's authority to implement affirmative action programs.⁷⁰ The Justices rejected the

60. Justice Powell rejected the school's program on equal protection grounds. *Bakke*, 438 U.S. at 308-09. Justices Brennan, Marshall, Blackmun and White approved the program on equal protection grounds. *Id.* at 379. Chief Justice Burger, Justices Stevens, Stewart and Rehnquist rejected the program as violating Title VI or VII of the Civil Rights Act of 1964. *Id.* at 408.

61. *Bakke*, 438 U.S. at 320.

62. *Id.*

63. *Id.*

64. *Bakke*, 438 U.S. at 307.

65. *Id.* at 309-10 n.59. Justice Powell was concerned that the decision was not made by a representative body of all of the community.

66. *Bakke*, 438 U.S. at 316-19.

67. *Id.* Justice Powell approved the use of race, but only as one factor in reviewing an applicant. *Id.* at 316-19.

68. *Bakke*, 438 U.S. at 324.

69. *Id.* at 265.

70. *Id.* at 328, 337. The Justices pointed to *North Carolina v. Swann*, 402 U.S. 43 (1971), which permitted voluntary programs even in the absence of a judicial determination of discrimination.

notion that strict scrutiny was the proper level of review.⁷¹ They accepted a level closer to the intermediate level.⁷² Applying this test, the Justices approved the medical school's plan.⁷³

More important to future decisions was the view of Justices Brennan, Marshall, and Blackmun, that efforts to eradicate past discrimination do not have to be predicated on proof that the "recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been victims of discrimination."⁷⁴ To require a specific contemporaneous showing of discrimination would be self-defeating and would undermine efforts to achieve voluntary compliance with Equal Protection requirements.⁷⁵ The Justices concluded that the medical school's plan could be justified by relying on national statistics which showed an imbalance between the percentage of minority doctors in relationship to the percentage of minority citizens.⁷⁶

In *Fullilove v. Klutznick*,⁷⁷ a divided Court approved a Congressional plan to increase the number of contracts being awarded to minority businesses.⁷⁸ Congress was viewed as a governmental entity competent to determine if there had been prior discrimination.⁷⁹ Justice Brennan noted that Congress is not alone in its ability to determine if there had been past discrimination.⁸⁰ State legislatures, which are analogous to the Congress, also possess the authority.⁸¹ Additionally, the state is free to delegate this authority as it sees necessary.⁸²

The Supreme Court still had to confront the question of

71. *Bakke*, 438 U.S. at 358-62.

72. *Id.* at 359. See *supra* notes 39-41 and accompanying text.

73. *Bakke*, 438 U.S. at 379. For a general discussion of preferential programs, see Sandalow, *Racial Preference in Higher Education*, 42 U. CHI. L. REV. 653 (1975).

74. *Bakke*, 438 U.S. at 363-64.

75. *Id.* at 362.

76. *Id.*

77. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

78. *Id.* at 453-54.

79. *Id.* at 473-80. This position was challenged in Days, *Fullilove*, 96 YALE L. REV. 453 (1987). The author contends the Court, by not requiring specific evidence of past discrimination, sent a confusing message to the lower courts on what proof is required to establish past discrimination. *Id.* at 457.

80. *Fullilove*, 448 U.S. at 366 n.42.

81. *Id.*

82. *Id.*

what is an adequate showing of discriminatory activities.⁸³ The opportunity presented itself in *Wygant v. Jackson Board of Education*.⁸⁴

In *Wygant*,⁸⁵ the Court invalidated a plan to protect minority teachers from layoffs.⁸⁶ The plan fired nonminorities who had more seniority before firing minority teachers with less seniority.⁸⁷

The school board wanted to retain minority teachers who faced layoffs.⁸⁸ To justify the plan, the school board expressed a desire to remedy societal discrimination by providing "role models"⁸⁹ for minority students. The school board wanted to preserve a balance between the number of minority students and minority teachers.⁹⁰

Again there was no majority opinion.⁹¹ Justice Powell concluded that the school board was in error because it compared the wrong groups in determining if there had been discrimination in the hiring practices of the school district.⁹² The proper comparison should have been between the number of minorities holding positions and the number of minorities available in the relevant work force.⁹³

The requirement that an affirmative action program must be based on past discrimination was explained by Justice Pow-

83. See *supra* note 79 and accompanying text.

84. *Wygant v. Board of Educ.*, 106 S. Ct. 1842 (1986).

85. *Id.*

86. *Id.* at 1859-60. The plan had the approval of the teacher's union. *Id.* at 1844.

87. *Id.* The plan originated in 1972 as a result of racial tension in the community. *Id.* at 1844.

88. *Wygant*, 106 S. Ct. at 1859-60. In 1974, the school district violated the plan by firing minority teachers. *Id.* The union brought suit and the plan to protect minority teachers was approved by the state courts. *Id.* at 1844-45.

89. *Id.* at 1846.

90. *Id.* The school district showed that the percentage of minority teachers had fallen below the percentage of minority students. *Id.* at 1847.

91. *Id.* at 1844.

92. *Wygant*, 106 S. Ct. at 1847.

93. *Id.* Justice Powell pointed to the Court's decision in *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977). In *Hazelwood*, a government imposed desegregation plan was reviewed. *Id.* The lower court's finding of discrimination was rejected because the government had not presented statistics comparing the number of teachers in the Hazelwood school district and the relevant work force. *Id.* The Supreme Court found the county in which the school district was located to be the relevant area. *Id.* at 310-13.

ell.⁹⁴ Unless the reason for implementing the program is demonstrated, the remedies could be "timeless in their ability to effect the future."⁹⁵ Since an affirmative action plan does discriminate, it is important that it have a limited lifespan.⁹⁶ Once the problem of discrimination is remedied, the need for the race-conscious cure is over.⁹⁷ A program based on general allegations of discrimination would not provide a means for determining when the program is no longer needed.⁹⁸

No clear consensus has emerged from the United States Supreme Court on the issue of affirmative action.⁹⁹ Although the Court has accepted that an affirmative action program is a legal means of combating discrimination,¹⁰⁰ it has not produced a majority view on the issue of what constitutes an adequate demonstration of past discrimination.¹⁰¹ A review of the current members of the Court will show that a favorable balance exists for affirmative action.

C. THE POSITION OF THE CURRENT COURT

Justices Brennan, Marshall, and Blackmun have consistently voted in favor of affirmative action. They approved the medical school's program in *University of California Regents v. Bakke*,¹⁰² the Congressional plan in *Fullilove v. Klutznick*¹⁰³ and the school board's efforts in *Wygant v. Jackson Board of Education*.¹⁰⁴ Employing an intermediate level of scrutiny, the Justices only require a showing of a "sound basis for calculating that minority underrepresentation is substantial and chronic."¹⁰⁵ The Justices do not require any specific findings of past discrimination.

94. *Wygant*, 106 S. Ct. at 1848.

95. *Id.*

96. *Id.* at 1847-48.

97. *Id.* at 1847.

98. *Id.*

99. See Justice O'Connor's opinion in *Wygant*, 106 S. Ct. at 1853, for a discussion of the "fragmentation" of opinions.

100. *Id.*

101. See generally, Kende, *Principles of Competence: The Ability of Public Institutions to Adopt Remedial Affirmative Action Plans*, 53 U. CHI L. REV. 581 (1986). The author suggests that there are five distinct views. *Id.* at 588.

102. 438 U.S. at 379.

103. 448 U.S. 448.

104. 106 S. Ct. at 1863.

105. *Bakke*, 438 U.S. at 363-64.

tion when "there is reason to believe that the evil addressed is a product of past discrimination."¹⁰⁶

Justice Stevens' position has radically changed from his initial view expressed in *Bakke*,¹⁰⁷ where he opposed affirmative action programs.¹⁰⁸ He joined Brennan, Marshall, and Blackmun in supporting the layoff plan of the school board in *Wygant*.¹⁰⁹ His analysis focuses on whether the purpose of a program is to include or exclude minorities.¹¹⁰ When the remedial purpose is to include minorities in a societal activity, the program meets his initial approval.¹¹¹ The program is then evaluated as to the harm to nonminorities.¹¹² The standard employed by Justice Stevens is that of fairness.¹¹³

Justice O'Connor held in *Wygant v. Jackson Board of Education* and *Johnson v. Transportation Agency, Santa Clara County, California*,¹¹⁴ that in order to justify an affirmative action plan, there must be a firm basis for believing that remedial action is required.¹¹⁵ This basis can be established by showing a statistical imbalance and does not require a demonstration of instances of actual discrimination.¹¹⁶ According to Justice O'Connor, a showing of specific acts of discrimination would discourage voluntary affirmative action programs.¹¹⁷ Additionally, a showing of actual discrimination would make the a governmental entity liable for violating Title VII of the Civil Rights Act of 1964.¹¹⁸

106. *Id.*

107. *Bakke*, 438 U.S. at 408.

108. Justice Stevens adhered to a strict interpretation of § 601 of the Civil Rights Act of 1964 which rejects all discrimination based on race. *Bakke*, 438 U.S. at 408.

109. *Wygant*, 106 S. Ct. at 1867.

110. For a discussion of Justice Stevens' views, see Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146 (1987).

111. *Wygant*, 106 S. Ct. at 1869.

112. *Id.* The Justice looks at two things: 1) assessment of the procedures used and 2) review of the nature of the harm. *Id.*

113. *Id.*

114. 107 S. Ct. 1442. In *Johnson*, the Supreme Court approved the use of gender as one factor in considering the promotion of a female employee of the County's transportation agency. *Id.* at 1446.

115. *Id.* at 1461.

116. *Id.* at 1462.

117. *Id.* at 1463. Justice O'Connor explained that the Court has long supported voluntary efforts to eliminate discrimination. *Id.*

118. *Id.* Title VII of the Civil Rights Act of 1964 makes it illegal for an employer to

Chief Justice Rehnquist and Justices White and Scalia continue to adhere to a strict interpretation of Title VII¹¹⁹ which forbids any use of race with regards to employment¹²⁰ and the application of strict scrutiny in questions of Equal Protection.¹²¹

D. THE VIEWS OF OTHER CIRCUITS

The Sixth Circuit in *Ohio Contractors Association v. Keip*,¹²² upheld an affirmative action program which established goals for the percentage of state contracting dollars going to minority businesses.¹²³ The legislative act which created the program,¹²⁴ did not contain any statement as to its purpose nor did it contain facts supporting findings of past discrimination.¹²⁵ The Court of Appeals upheld the program's constitutionality¹²⁶ because "its purpose and objective were absolutely clear from the text and the hearings and floor debate which proceeded final enactment."¹²⁷ The Sixth Circuit looked beyond the legislative act¹²⁸ itself to support a finding of past discrimination.¹²⁹ The Sixth Circuit relied primarily on the district court's finding of discrimination¹³⁰ in the construction trade as determined in *Ethridge v. Rhodes*.¹³¹ Another source of information was a "special task force" that investigated the presence of discrimina-

refuse to hire or discriminate against any person because of race. See 42 U.S.C. § 2000e-2(a) (1964).

119. *Johnson*, 107 S. Ct. at 1465.

120. See *supra* note 118.

121. *Wygant*, 106 S. Ct. at 1857. Justice Scalia's strict statutory interpretation is demonstrated in *Johnson*, 107 S. Ct. at 1465.

122. 713 F.2d 167 (6th Cir. 1983).

123. *Id.* at 168.

124. OHIO REV. CODE § 123.151(C)(1) (1980).

125. *Keip*, 713 F.2d at 170.

126. *Id.* at 176.

127. *Id.* at 170.

128. OHIO REV. CODE § 123.151(C)(1) (1980).

129. *Keip*, 713 F.2d at 170. The court compared the position of the state legislators to that of the U.S. Congress in *Fullilove*. *Id.* Both are assumed to possess knowledge of past governmental activities which are concerned with investigations of the presence of discrimination. *Id.* Congress in *Fullilove* was assumed to benefit from all the past activities involving the elimination of discrimination. *Fullilove*, 448 U.S. at 467. The Sixth Circuit held that state legislators also benefited from past efforts to eliminate discrimination. *Keip*, 713 F.2d at 170.

130. *Keip*, 713 F.2d at 171. The court held that the state had participated with private industry and craft unions in a pattern of racially discriminatory activity. *Id.*

131. 268 F. Supp. 83 (S.D. Ohio 1967).

tion in the awarding of contracts to minorities.¹³² The task force report showed that while MBEs constituted 7 percent of all businesses in Ohio, only 0.5 percent of the state's purchase contracts were given to minorities.¹³³ The court determined this statistical comparison was indicative of an "imbalance in the contracts."¹³⁴

The Eleventh Circuit in *South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida*,¹³⁵ upheld the constitutionality of a program granting preferential treatment to minorities in the county's contract bidding process.¹³⁶ The court held that the district court's finding of facts¹³⁷ were not only adequate,¹³⁸ but "binding unless clearly erroneous."¹³⁹ The basis for justifying the affirmative action program was the imbalance between the minority population and both the number of minority businesses within the county and those MBEs receiving contracts.¹⁴⁰ One of the major objectives of the program was to stimulate the minority business community and promote a sense of economic equality.¹⁴¹ The Eleventh Circuit noted that discrimination can retard economic development of the minority community.¹⁴² Therefore, preferential programs may go beyond the awarding of contracts to minorities.¹⁴³ A preferential program may help create more MBEs.¹⁴⁴

132. *Keip*, 713 F.2d at 171. The task force was established by the state attorney general and found that there was an imbalance in the amount of business the state did with minority groups. *Id.*

133. *Id.*

134. *Id.*

135. 723 F.2d 846 (11th Cir. 1984).

136. *Id.* at 848. The program included bid credits, set-asides and minority participation goals. *Id.*

137. *South Fla. Chapter v. Metropolitan Dade County*, 552 F. Supp. 909 (S.D. Fla. 1982).

138. *South Fla. Chapter v. Metropolitan Dade County*, 723 F.2d 846, 848 (11th Cir. 1984).

139. *Id.* at 848 n.2.

140. *Id.* at 848.

141. The Eleventh Circuit held that the County had a compelling interest to encourage growth in the minority business community. *Id.*

142. *South Fla. Chapter*, 723 F.2d at 857.

143. *Id.* at 856. The plan had as one of its purposes the development and growth of economic and business opportunities for its community. *Id.*

144. *Id.*

The approach employed by the Sixth and Eleventh Circuits looked to the surrounding circumstances of each case.¹⁴⁵ Taken under review by the Sixth and Eleventh Circuits were the findings of the district court,¹⁴⁶ the legislative history of the act,¹⁴⁷ findings of investigative agencies¹⁴⁸ and general population statistics which reflected a need to stimulate minority involvement in the economy of the community.¹⁴⁹

The Eighth Circuit in *Catlett v. Missouri Highway and Transportation Commission*,¹⁵⁰ affirmed that the State Highway and Transportation Commission discriminated against women in its hiring practices.¹⁵¹ The court relied on statistical evidence showing an imbalance between the number of women hired and the "number expected to be hired."¹⁵² Additionally, testimonial evidence recounting instances of discrimination was used to show a "preponderance of evidence that the employer engaged in a pattern of unlawful discrimination."¹⁵³ Relying on past Supreme Court decisions,¹⁵⁴ the Eighth Circuit determined that either statistics or allegations of discrimination was sufficient to establish a pattern of discrimination.¹⁵⁵ In *Catlett*,¹⁵⁶ examples of specific discriminatory acts and the statistical disparity established the fact that discrimination existed.¹⁵⁷

In *Higgins v. City of Vallejo*,¹⁵⁸ a Ninth Circuit case decided four months after *Associated General Contractors v. City*

145. See *supra* notes 129 and 141 and accompanying text.

146. See *supra* text accompanying notes 131 and 137.

147. See *supra* note 129 and accompanying text.

148. See *supra* note 132 and accompanying text.

149. *South Fla. Chapter*, 723 F.2d at 848. The Eleventh Circuit permitted the comparison of contracts awarded to minorities and general population figures. *Id.*

150. 828 F.2d 1260 (8th Cir. 1987).

151. *Id.* at 1266. It was demonstrated that while women constituted forty-eight percent of the relevant work force, less than ten percent had been hired. *Id.*

152. *Id.* at 1265.

153. *Id.* at 1266. Female applicants were discouraged from applying for positions and told there would be tasks inappropriate for females. *Id.* at 1265-66.

154. *Id.* at 1265. The Eighth Circuit pointed to *Hazelwood School Dist. v. U.S.*, 433 U.S. 299, 307-308 (1977) that required a comparison of the relevant work forces and acceptance of antedotal evidence of discrimination. *Catlett*, 828 F.2d at 1265.

155. *Catlett*, 828 F.2d at 1265.

156. The individual claims for Title VII violations were rejected. *Id.* at 1264. The class claim alleging discrimination was upheld by the Eighth Circuit. *Id.* at 1265.

157. *Id.* at 1265-66.

158. 823 F.2d 351 (9th Cir. 1987).

and County of San Francisco,¹⁵⁹ an affirmative action program instituted by the City of Vallejo was reviewed and approved.¹⁶⁰ The court relied exclusively on the findings of the California Fair Employment Practices Commission.¹⁶¹ In its report, the Commission found that the city's hiring policy did not result in a government work force that reflected the racial make-up of the city.¹⁶² The report showed that while the city's population was approximately thirty percent minority, only 11.4 percent of the municipal work force was minority.¹⁶³ Additionally, the court pointed to the hiring practices of the fire department and reviewed the number of minorities hired between the years 1972 and 1983.¹⁶⁴ However, no relationship was made to the size of the relevant work force in the city during that period of time.¹⁶⁵ Yet, the Ninth Circuit held that "the record provides abundant evidence that the City of Vallejo engaged in past discrimination."¹⁶⁶

159. *Associated Gen. Contractors*, 813 F.2d 922.

160. *Higgins*, 823 F.2d at 352. The suit was filed by a nonminority firefighter who had been passed over for a promotion. *Id.*

161. *Id.* at 356. The California Fair Employment Practices Commission conducted an investigation in 1973 and found the city's employment practices disfavored minorities. *Id.*

162. *Id.*

163. *Id.*

164. *Higgins*, 823 F.2d at 356. The first black fire department employee was not hired until 1964. *Id.*

165. The court relied, instead, on the fact that in the history of the fire department, only three blacks had ever held the position. *Higgins*, 823 F.2d at 356.

166. *Id.* In addition to the cases cited above, see *Ledoux v. District of Columbia*, 820 F.2d 1293 (D.C. Cir. 1987) A plan to encourage promotion of minorities and women in the D.C. police force was challenged and remanded to the trial court for a determination of evidence of discrimination with the proper standard to be a "greater quantum of statistical evidence, evidence of prior discrimination or some combination."; *Edinger v. City of Louisville*, 802 F.2d 213 (6th Cir. 1986) Plan to increase minority participation in City of Louisville contracting invalidated because the Board had offered only general population statistics to support a claim of discrimination. The court held that general population statistics were sufficient when combined with independent studies or evidence of historical discrimination." *Hammon v. Barry*, 813 F.2d 412 (D.C. Cir. 1987) Rejected a program to increase the number of minorities hired by the D.C. fire department. There had been no showing of discrimination by plaintiffs. Relying entirely on hiring statistics, the court found evidence of a nondiscriminatory attitude towards hiring minorities. *Britton v. South Bend Community School Corp.*, 819 F.2d 766 (7th Cir. 1987) Invalidated a school board plan to protect minority teachers from layoffs. The school board relied on the same "role model" theory as was used in *Wygant*. The court rejected the plan because no additional evidence of discrimination was presented. Additionally, hiring statistics revealed no discrimination in the school district's hiring procedure.

In *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987), a minority business enterprise preference program was invalidated by the court because of a failure

IV. COURT'S ANALYSIS

The Ninth Circuit, in *Associated General Contractors v. City and County of San Francisco*,¹⁶⁷ utilized a three part test for reviewing the Equal Protection issue: 1) Did the city have the authority to establish an affirmative action program which was racially biased on its face? 2) Were the city's findings of discrimination adequate? 3) Were the means selected adequate?¹⁶⁸

While the court concluded that the city had the authority to implement an affirmative action program,¹⁶⁹ the court found that the city failed to adequately demonstrate a finding of discrimination.¹⁷⁰ Also, the court rejected the means employed by the city.¹⁷¹

to show prior discrimination. *Id.* at 1358. The City of Richmond used general population figures and five hours of public hearings to support its claim of discrimination in the awarding of city contracts. *Id.* The dissent of Judge Sprouse explores the question of whether statistics comparing relevant work forces always accurately portrays the presence of discrimination. *Id.* at 1362. Discrimination may also impact the relevant work force of the community. *Id.* at 1363. General population statistics may more precisely reflect the effect of discrimination. *Id.* at 1365.

In *Croson*, only two-thirds of one percent of contracts were awarded to minority contractors while fifty percent of the population of Richmond was minority. *Id.* at 1364. Judge Sprouse noted that these figures "[break] the bounds of the sometimes suspect 'science' of statistics and is probative of a good deal more than general discrimination." *Id.* at 1365.

This view was echoed in *Johnson*, 107 S. Ct. 1442, by Justice O'Connor. In *Johnson*, women applying for the employment position under review "had not been strongly motivated to seek training or employment." *Id.* at 1463. As a result, the statistical comparison of workers employed and relevant work force did not suggest discrimination. *Id.* Contradicting this statistical conclusion was the fact that prior to the promotion under review in *Johnson*, none of the 238 positions had ever been held by women. *Id.* Acknowledging the inconsistency, Justice O'Connor concluded that an affirmative action program can be based on efforts to remedy "past apparent discrimination." *Id.* at 1464.

The basis for demonstrating past apparent discrimination is a determination of whether the number of minorities in a job classification is at a reasonable level in comparison with "estimates of the number of persons from these groups in the area work force who can meet the educational and experience requirements for employment." *Id.* at 1464.

167. 813 F.2d 922 (9th Cir. 1987).

168. *Id.* at 928.

169. *Id.* at 929.

170. *Associated Gen. Contractors*, 813 F.2d at 931-32.

171. *Id.* at 938.

A. DID THE CITY HAVE AUTHORITY?

The question of authority was decided without an opposing argument.¹⁷² The Ninth Circuit relied on Justice O'Connor's opinion in *Wygant v. Jackson Board of Education*¹⁷³ which held that a state or its political subdivision has the authority to determine if it is "denying its citizens equal protection of the law and if so, to take corrective steps."¹⁷⁴ Accordingly, the Ninth Circuit acknowledged the city's authority to establish an affirmative action program.¹⁷⁵

B. WERE THE CITY'S FINDINGS ADEQUATE?

The burden was placed on the city to justify its affirmative action program.¹⁷⁶ "At a minimum, the state or local government must be acting to remedy government-imposed discrimination, perpetuated by it."¹⁷⁷ Emphasis was placed on the view that the city itself must have discriminated by its own method of awarding contracts.¹⁷⁸ The Ninth Circuit noted that societal discrimination as the justification for a race-based program was inadequate.¹⁷⁹ With that perspective established, the court reviewed the city's findings regarding past discrimination.¹⁸⁰

The city relied extensively on the findings of the Human Rights Commission.¹⁸¹ The Commission reported finding specific claims of discriminatory activities conducted by the city in the awarding of its contracts.¹⁸² Included in these allegations were statements by minority firms¹⁸³ and individuals working in the

172. *Id.* at 929.

173. *Wygant*, 106 S. Ct. 1842 (1986).

174. *Associated Gen. Contractors*, 813 F.2d at 929.

175. *Id.*

176. *Id.* at 930. The Ninth Circuit held that the city could be acting only to "correct their own past wrongdoing." *Id.*

177. *Id.*

178. *Id.* The Ninth Circuit was concerned that at this low level of government, measures were being decided not according to the rules of justice and the rights of a minority party but by "a superior force of an interested and overbearing majority." *Id.*

179. *Associated Gen. Contractors*, 813 F.2d at 930. Societal discrimination is "discrimination not traceable to its own actions." *Id.*

180. *Id.*

181. *Id.* at 931 n.15. See *supra* note 5 and accompanying text.

182. See *supra* note 5 and text accompanying notes 5-9.

183. HRC Report, *supra* note 5, at 18-23.

city that discrimination was present.¹⁸⁴ Statistical data was also presented showing an imbalance in the number of city contract dollars awarded and the number of minority firms in the city.¹⁸⁵

The Ninth Circuit objected to the city's use of statistics in its effort to demonstrate discrimination.¹⁸⁶ Specifically, the Ninth Circuit rejected the city's attempt to relate the number of MBEs awarded city contracts to the total number of all MBE businesses in the city.¹⁸⁷ According to the court, the comparison should be limited to only those MBEs that provide the services required by the city.¹⁸⁸ The Ninth Circuit felt that the comparison presented by the city was not between relevant groups.¹⁸⁹

Furthermore, the city failed to include subcontractors in its comparison.¹⁹⁰ Including subcontractors would have shown the total dollar amount going to minorities.¹⁹¹ This was fatal because the court could find no proof that minority subcontractors were not receiving city dollars.¹⁹²

While the Ninth Circuit praised the efforts of the city's investigators, the court nevertheless concluded that the city failed to uncover any finding of prior discrimination since no discrimination against minorities by city officials or under color of the city's authority had been shown.¹⁹³

C. WERE THE MEANS SELECTED APPROPRIATE?

Relying on *Regents of University of California v. Bakke*,¹⁹⁴ the Ninth Circuit employed the requirement that the "means adopted must be narrowly tailored."¹⁹⁵ Again the city failed to pass the court's scrutiny because the program encompassed all

184. *Id.*

185. HRC Report, *supra* note 5, at 27-31.

186. *Associated Gen. Contractors*, 813 F.2d at 931.

187. *Id.* at 933.

188. *Id.* at 933-34.

189. *Id.*

190. *Associated Gen. Contractors*, 813 F.2d at 933.

191. *Id.* The HRC Report showed that in 1982, 19.3 percent of the city's contracting dollars went to construction subcontractors. *Id.* at 933 n.22.

192. *Id.* at 933.

193. *Id.* at 931-32.

194. 438 U.S. 265 (1978).

195. *Associated Gen. Contractors*, 813 F.2d at 934.

aspects of city contracting.¹⁹⁶ The court was concerned with the fact that the ordinance “casts such a wide net”¹⁹⁷ since it was not limited to one area of contracting.¹⁹⁸ The fault of a program encompassing all aspects of the city’s contracting needs was that the distribution of available MBEs was uneven.¹⁹⁹ Some business areas have very few MBEs to draw from.²⁰⁰ Similarly, the Panel noted that the distribution of non-MBEs was not uniform.²⁰¹ As a result, “a non-MBE business in an industry heavily dependent upon city procurement where MBEs have a significant share of the market, may well be destroyed.”²⁰² With this potential for destruction of non-MBE enterprises, the Ninth Circuit faulted the city’s plan because it offered no means to ameliorate such a harsh effect.²⁰³

The court also determined that an administrative procedure designed to safeguard non-MBEs against the harsh effects of inequitable application was missing.²⁰⁴ A proper administrative remedy would have provided a mechanism through which non-MBEs could raise the objection that the city’s efforts: 1) did not apply to their industry; 2) would have too harsh an impact on the non-MBE; or 3) was being used by MBEs to reap a wind-fall.²⁰⁵ The Ninth Circuit determined that such a safeguard was “entirely lacking” in this ordinance.²⁰⁶

Finally, the court determined that other untested means are available for remedying the limited participation of MBEs in the contracting process.²⁰⁷ The Ninth Circuit concluded that the city

196. *Id.* at 936.

197. *Id.*

198. *Id.* at 936. The city contracts included “everything from construction and consulting to interpreting and book binding.” *Id.*

199. *Id.*

200. *Associated Gen. Contractors*, 813 F.2d at 936.

201. *Id.*

202. *Id.*

203. *Id.* at 937-38. The plan in fact does contain provisions for waiving the requirement when it can be shown that compliance is not feasible or “sufficient qualified Minority and Women Business Enterprises capable of providing the goods or services required are unavailable in the market area of the project.” SAN FRANCISCO, CA., ADMINISTRATIVE CODE ch. 12D § 12D.9(2)(a) (1980).

204. *Associated Gen. Contractors*, 813 F.2d at 937-38.

205. *Id.* at 938.

206. *Id.*

207. *Id.* at 938-39. Some of the court’s suggestions included eliminating arbitrary imposition of bonding and insurance requirements, increasing the amount of advertising

had not explored less drastic means.²⁰⁸ Thus, until such means are explored by the city and shown to have failed, the use of bid preferences cannot be justified.²⁰⁹

In summary, the Ninth Circuit concluded that the ordinance violated the Equal Protection Clause of the Constitution²¹⁰ because the city had not demonstrated an adequate finding of discrimination in the method it was using to award contracts²¹¹ and had not explored less restrictive means of remedying the alleged problems associated with minority contract awards.²¹²

V. CRITIQUE

The City of San Francisco's affirmative action program was found to be unconstitutional by the Ninth Circuit on the basis that the city failed to show "any discrimination against minorities by city officials or under color of the city's authority."²¹³ The court relied extensively on the language of Justice O'Connor in *Wygant*.²¹⁴ Yet the *Wygant* Court made clear the Supreme Court's position that specific acts of discrimination are not only unnecessary but unrealistic given the liability exposure that such an admission would create.²¹⁵ The Ninth Circuit's position requiring "the governmental entity itself discriminated"²¹⁶ contradicts the *Wygant* view.²¹⁷ "The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to voluntarily meet their civil rights obligations."²¹⁸ Yet the

of available contracts and providing educational programs for minority businesses. *Id.*

208. *Associated Gen. Contractors*, 813 F. 2d at 938.

209. *Id.* at 939. The position taken by the city was that earlier efforts to promote minority participation had failed. Petition for Rehearing for Appellant at 6, *Associated Gen. Contractors v. City of San Francisco*, 813 F.2d 922 (9th Cir. 1987).

210. *Id.* at 944.

211. *Id.*

212. *Id.*

213. *Associated Gen. Contractors v. City of San Francisco*, 813 F.2d 922, 931-32 (9th Cir. 1987).

214. *Id.* at 930.

215. *Wygant*, 106 S. Ct. at 1855.

216. *Associated Gen. Contractors*, 813 F.2d at 930.

217. *Wygant*, 106 S. Ct. at 1855.

218. *Id.*

Ninth Circuit objects to the city's program because the city failed to demonstrate specific acts of discrimination.²¹⁹

Contrary to the Ninth Circuit's finding, the district court found sufficient evidence of discrimination on the part of the city.²²⁰ The district court, even without the guidance of the *Wygant* decision, compared the percentage of contracts awarded to minorities with the number of minority firms available in the relevant work force.²²¹ The statistics showed that while 30.59 percent of all construction firms in San Francisco are minority owned, they were awarded no more than 2.8 percent of all city contracts.²²² In spite of this conclusion, no where does the Ninth Circuit refer to the district court's findings of fact.²²³

Also overlooked by the Ninth Circuit was the report submitted by the Human Rights Commission (HRC)²²⁴ showing that twelve of the forty-two individuals or firms which testified before the Commission expressed specific allegations of racial discrimination.²²⁵ Additionally, testimony of city personnel revealed individual department practices made it virtually impossible for new firms to break into the contracting process.²²⁶

The city had made attempts to encourage minority participation in city contracting through programs prior to the program in the instant case.²²⁷ Efforts to aid MBEs by requiring nonminority contractors to use MBEs as subcontractors had failed.²²⁸ The HRC documented that in eleven cases, MBE sub-

219. *Associated Gen. Contractors*, 813 F.2d at 931-32.

220. *Associated Gen. Contractors v. City of San Francisco*, 619 F. Supp. 334, 340 (N.D. Cal. 1985).

221. *Id.* at 340 n.3.

222. *Id.*

223. The failure of the Ninth Circuit to discuss the district court's finding of facts raises the issue of when an Appeals Court can overrule a district court's finding of facts. The position of the Supreme Court was discussed in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). The *Pullman* Court held that a district court's finding of facts can not be overruled unless they are shown to be "clearly erroneous." *Id.* at 287.

224. HRC Report, *supra* note 5 and accompanying text.

225. HRC Report, *supra* note 5, at 9-14.

226. HRC Report, *supra* note 5, at 31.

227. Earlier attempts by the city included legislation aimed at fighting employment discrimination by firms contracting with the city. ADMINISTRATIVE CODE ch. 12B (1978). Additionally, the city attempted to encourage the use of minority subcontractors by those contracting with the city. ADMINISTRATIVE CODE ch. 12B(9) and 12 (B)4(c)(5) 1980.

228. *See Associated Gen. Contractors v. City of San Francisco*, 619 F. Supp. 334

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contractors were dropped by the prime contractors once the contracts were awarded.²²⁹

The HRC Report discussed the significance and necessity of supporting efforts to encourage the use of MBEs as primary contractors. The business advantages are: 1) a provision for overhead expenses is incorporated into the prime bid but not the subcontractor's bid; 2) profit is greater for the prime; and 3) the prime contractor selects, utilizes, and ultimately pays the subcontractors.²³⁰

Since the efforts to aid MBE had failed,²³¹ the city devised a program that directly encouraged minority participation in city contracting.²³² Contrary to the Ninth Circuit's finding, the city had explored less drastic means which were found to be ineffective.²³³

The Ninth Circuit held that evidence of MBE participation in city contracting as subcontractors was sufficient to refute charges of racial discrimination.²³⁴ This reasoning is disturbing because it would allow for discrimination on the level of primary contractors as long as it can be shown that some city dollars are trickling down to minority subcontractors.²³⁵

Finally, the view that the city must demonstrate specific acts of discrimination to support the imposition of an affirmative action program is not consistent with the views expressed by other Circuit Courts of Appeals.²³⁶

(N.D. Cal. 1985). Finding of facts and conclusions of law, Finding 9.

229. HRC Report, *supra* note 5, at 9-14.

230. HRC Report, *supra* note 5, at 30.

231. *See Associated Gen. Contractors*, 619 F. Supp. 334, findings of facts and conclusions of law, Finding 9.

232. *Id.*

233. *Id.* Additionally, there is no requirement that the least restrictive means be employed. *Fullilove*, 448 U.S. at 508.

234. *Associated Gen. Contractors*, 813 F.2d at 933.

235. The advantages for promoting minority participation in the city contracting process as prime contractors was discussed by the Human Rights Commission. HRC Report, *supra* note 5, at 30.

236. The other Circuit Courts have accepted statistical evidence and anecdotal claims of discrimination to support the need for affirmative action programs. *See supra* text accompanying notes 122-66.

VI. CONCLUSION

For the past ten years, the Supreme Court has both recognized the need for affirmative action programs and struggled with the method for analyzing whether such a program was constitutional. As one commentator has pointed out, "[f]ew issues are more starkly divisive in our politics than affirmative action . . . [n]o one standard of review or formula applying it [has] ever captured five votes . . . [b]ut all nine Justices [have] said that classifications favoring racial minorities may sometimes be tolerated"237

The Ninth Circuit in *Associated General Contractors v. City and County of San Francisco*,²³⁸ employed the three part test used by the Supreme Court in reviewing affirmative action programs.²³⁹ The court erred in its application of the test to the specific facts of this case.²⁴⁰ The Ninth Circuit's criterion for demonstrating past discrimination is out-of-step with its own view, as expressed in other Ninth Circuit cases,²⁴¹ as well as developments in other circuits²⁴² and the Supreme Court.²⁴³ This decision of the Ninth Circuit stands alone in requiring a demonstration of specific acts of discrimination by the governmental agency.²⁴⁴

The Ninth Circuit ignored the findings of discrimination by

237. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 1, 118 (1986).

238. 813 F.2d 922 (9th Cir. 1987).

239. *Id.* at 929. The three-part test consisted of the following: 1) Did the city have the authority to establish the program? 2) Were the city's findings of discrimination adequate? 3) Were the means selected adequate? *Id.*

240. The Ninth Circuit failed to acknowledge that, statistically, the city demonstrated that in the construction industry, at least, there was an imbalance in the number of contracts awarded to minority firms. *Associated Gen. Contractors*, 619 F. Supp. 334, 340 n.3.

241. See, e.g., *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987). See text accompanying notes 158-66.

242. See text accompanying notes 122-66 and note 166.

243. See, e.g., *Wygant*, 106 S. Ct. at 1853. The *Wygant* decision confirmed that evidence of specific acts of discrimination are inconsistent with its desire to encourage voluntary eradication of discrimination. *Id.*

244. The liability exposure that would result from such admissions has been highlighted as the primary reason for not requiring such specific admissions. See *Johnson*, 107 S. Ct. at 1463.

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the Human Rights Commission and the district court²⁴⁵ which supports the conclusion that even statistical data required by *Wygant* will not satisfy this court's requirement for a demonstration of past discrimination. The Ninth Circuit decision raises the barrier for affirmative action programs to insurmountable heights. Whether any affirmative action program could pass the scrutiny of the Ninth Circuit is in question after this decision.

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245. HRC Report, *supra* note 5, at 9-14, 31. The HRC Report provided anecdotal and statistical evidence of discrimination. *Id.* The district court found statistical evidence of discriminatory practices in the methods used by the city in awarding its contracts. *Associated Gen. Contractors*, 619 F. Supp. 334, 340 n.3.

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